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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~634~~ 14

MAE WHEELER, et al.,
Appellants,

v.

JOHN MONTGOMERY, et al.,
Appellees.

Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANTS

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Summary of Argument	8
Argument:	
I. Due Process Requires a Full and Adequate Hearing Prior to Termination. The California Informal Conference Does Not Comply with This Requirement	9
A. The Welfare Context and the California Informal Conference	9
B. The Elements of Due Process in an Adjudicative Hearing Where Livelihood Is at Issue Are Lacking in the California Informal Conference	14
1. The Informal Conference Fails to Provide Basic Elements of Due Process Found by This Court to Be Constitutionally Required in Cases Calling for Adjudicative Hearings	17
a. Right to adequate notice	17
b. The right to cross-examine and confrontation	18
c. The right to an impartial decision maker	21
d. Other elements of due process	22
2. Due Process Principles Established by This Court Have Been Applied by a Growing Number of Lower Courts to Require a Full and Adequate Adjudicative Hearing Before Termination of Welfare Assistance	23
II. Continuation of Welfare Assistance Pending a Fair Hearing Decision Is Required by the Social Security Act	25
Conclusion	27

TABLE OF AUTHORITIES

Cases	Pages
Bible v. Smith, No. 706263 (Wash. Super Ct., March 16, 1969)	24
Camerena v. Dept. of Public Welfare, No. 1 CA-CIV 719 (Ariz. Ct. of App., Div. 1, filed Jan. 28, 1969)	23
Carrington v. Rash, 380 U.S. 89 (1965)	16
County of Contra Costa v. Social Welfare Board, 40 Cal. Rptr. 605 (1964)	10
Diaz v. Dunn, No. 68411 (D.C. Mass., filed May 15, 1968)	24
Diaz v. Quitoriano, 74 Cal. Rptr. 358 (1969)	10
Family Finance Corp. v. Sniadach, 37 Wisc. 2d 163, 154 N.W. 2d 259 (1967)	15
Greene v. McElroy, 360 U.S. 474 (1959)	18, 19, 27
Hannah v. Larche, 363 U.S. 420 (1960)	18
Harman v. Forssenius, 380 U.S. 528 (1965)	16
Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964)	18
I.C.C. v. Louisville & Nashville R.R., 227 U.S. 88 (1913)	16, 22
In re Murchison, 349 U.S. 113 (1955)	21
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951)	27
Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968)	22, 23
King v. Smith, 392 U.S. 309 (1968)	4, 27
Kwock Jan Fat v. White, 253 U.S. 455 (1913)	22
Lage v. Downing, C.A. No. 7-2089-C-2 (S.D. Iowa, 1968)	24
Machado v. Hackney, Civ. Action No. 68-108-SA (W.D. Texas, May 12, 1969)	23, 27
McCullough v. Terzian, No. 379011 (Cal. Super. Ct., Alameda Cty., May 1968)	16, 23
Miller v. Zoeller, No. 69-C-2 (W.D. Wis., order filed Jan. 20, 1969)	24

Pages

Moore v. Houston, No. 104435 (Mich. Cir. Ct., Wayne Cty., Nov. 1, 1968) 23
Morgan v. U.S., 304 U.S. 1 (1938) 18

Oyama v. California, 332 U.S. 633 (1948) 16

Parrish v. Civil Service Commission of the County of Alameda, 57 Cal. Rptr. 623, 425 P.2d 223 (1967) 10

Rios v. Hackney, 294 F. Supp. 885 (N.D. Tex. 1967) 19
Robertson v. Born, Civil Action No. 51364 (N.D. Cal., June 21, 1969) 23

Shapiro v. Thompson, ... U.S. ....., 89 S.Ct. 1322 (1969) 14, 16
Sherbert v. Verner, 374 U.S. 398 (1963) 14
Sims v. Juras, No. 69-238 (D.C. Ore., April 30, 1969) 24
Smith v. King, 277 F. Supp. 31 (1967), *aff'd* 392 U.S. 309 (1968) 22
Sniadach v. Family Finance Corporation, ... U.S. ....., 37 U.S.L.W. 4520 (June 9, 1969) 15, 16
Southern Stevedoring Co. v. Voris, 190 F.2d 275 (5th Cir. 1951) 19

Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969) 25

Van Blaricum v. Dept. of Public Welfare of the State of Ohio, No. 68-78 (S.D. Ohio, May 5, 1968) 24

Wheeler v. Montgomery, 296 F. Supp. 138 (1968) 1
Williams v. Gandy, Civ. No. G.C. 6728 (N.D. Miss., filed June 9, 1967) 23
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1962) 18
Wong Yang Sung v. McGrath, 339 U.S. 33, (1950) 21

STATUTES AND REGULATIONS

28 U.S.C. § 1253 2
28 U.S.C. § 1343(3) 2
28 U.S.C. § 1343(4) 2
28 U.S.C. § 2101(b) 2
28 U.S.C. § 2201 2
28 U.S.C. § 2202 2
28 U.S.C. § 2281 2
42 U.S.C. § 302 4
42 U.S.C. § 601 26
42 U.S.C. § 1351 26
42 U.S.C. § 1983 2
42 U.S.C. § 302(a)(4) 25
42 U.S.C. § 602(a)(4) 25
42 U.S.C. § 1202(a)(4) 25
42 U.S.C. § 1382(a)(4) 25
Fed. R. Civ. P. 23 2
Fed. R. Civ. P. 23(b)(2) 6
HEW, Federal Handbook, Part IV, §§ 6200, *et seq.* 6, 26
PSS 44-325.43 10
PSS 44-325.421 10
PSS 44-325.434(c) 22
Vol. 34, Fed. Reg., No. 16, p. 1144, Jan. 23, 1969 26

OTHER AUTHORITIES

Bell and Norvelle, Texas Welfare Appeals: The Hidden Right, 46 Texas L. Rev. 223 (1967) 13
Burrus and Fessler, Constitutional Due Process Hearing Requirements in the Adiminstration of Public Assistance: The District of Colmbia Experience, 16 Am. U.L. Rev. 199 (1967) 23
Briar, The Welfare Appeals System in California, October 23, 1968 ..... 12, 13 20
Briar, Welfare From Below: Recipients' Views of the Public Welfare System, 54 Calif. L. Rev. 370 (1966) 10

Pages

California Department of Social Welfare, Circular Letter #2064, November 1967 12

California Department of Social Welfare, Public Welfare in California: Annual Statistical Report (1967-68) 6, 14

California Department of Social Welfare, Research and Statistics Division, Restoration of Aid Payments Following Filing of Affidavit: Cases and Amounts of Monthly Payment by County (May 6, 1969) 12

California State Assembly, California Welfare: A Legislative Program for Reform, February 1969 13

Comment, Eligibility Determinations in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania, 115 U. Pa. L. Rev. 1307 (1967) 13

Comment, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234, 1244 (1967) 14, 23

Davis, Administrative Law, §§ 701-705 (1958 and Supp. 1065) 16

Graham, Civil Liberties Problems in Welfare Administration, 43 N.Y.U.L. Rev. 836 (1968) 10

Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245 (1965) 29

Report of the National Advisory Commission on Civil Disorders, Bantam Books Edition (1968) 10

Summary of All Fair Hearing Decisions, published by the California Department of Social Welfare 13

Wedemeyer and Moore, The American Welfare System, 54 Calif. L. Rev. 326 (1966) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 634

MAE WHEELER, et al.,
Appellants,

v.

JOHN MONTGOMERY, et al.,
Appellees.

Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANTS

OPINIONS BELOW

The memorandum and order [A. 61-64] of the court below finally dismissing the claim set forth in appellants' complaint is reported at 296 F. Supp. 138 (1968). The memorandum and order of the United States District Court for the Northern District of California [A. 27-33] requesting the convening of a three-judge court and permitting appellants to proceed as a class pursuant to Rule 23, Federal Rules of Civil Procedure, is unreported. The temporary restraining order filed by the court below [A. 23-26] is unreported.

JURISDICTION

This is a direct appeal to this court pursuant to 28 U.S.C. §§ 1253 and 2101(b) from the final decision of the three-judge court below which was convened in compliance with 28 U.S.C. § 2281.

The court below had jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3) and (4), and 28 U.S.C. §§ 2201 and 2202, to grant the requested injunctive and declaratory relief against the continued application to appellants of regulations of the California Department of Social Welfare (hereinafter referred to as California Department) implementing statutes of statewide application which permit termination of welfare benefits without adequate notice and hearing. The final judgment of the court below denying the requested relief and dismissing the action was entered on April 19, 1968. Appellants filed notice of appeal on June 14, 1968. On July 24, 1968, an application, pursuant to Supreme Court Rule 13, for an extension of time to docket the appeal and file the record, was made to Mr. Justice Douglas. On July 29, 1968, the application was granted ordering that time for docketing the appeal be extended to October 12, 1968. The appeal was docketed on October 11, 1968, and this court noted probable jurisdiction on April 21, 1969. .... U.S. ...., 89 S. Ct. 1452 (1969). On May 13, 1969, appellants' motion for an extension of time to file the appendix and brief was granted and the time extended to and including July 1, 1969.

QUESTIONS PRESENTED

Appellant Mae Wheeler (Wheeler) is a 75 year-old widow who receives Old Age Security welfare benefits. She and all other welfare recipients depend on their monthly grants to provide themselves with minimal food, shelter, clothing

and medical care. Termination of their welfare grants can, for some, literally mean the difference between life and death. Under these circumstances:

(1) does due process permit the termination of a regularly recurring subsistence grant to welfare recipients without adequate notice and without a prior hearing on the factual questions underlying the decision to cut off assistance; and

(2) does an interview with a caseworker or other county welfare official without notice of the evidence relied on for termination and without confrontation or cross-examination satisfy the requirements of the Due Process Clause for a prior hearing?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves the Social Security Act of 1935, as amended, 42 U.S.C. §§ 302(a)(4) *et seq.* The following portions of the Social Security Act are set forth in Appendix I, *infra*, pp. 1a-2a:

42 U.S.C. § 302(a)(4)
42 U.S.C. § 602(a)(4)
42 U.S.C. § 1202(a)(4)
42 U.S.C. § 1382(a)(4).

This case also involves regulations promulgated under authority of the above statutes. The following regulations are set forth in Appendix II, *infra*, pp. 3a-13a.

Fair Hearings, 25 C.F.R. § 205.10.

The Department of Health, Education, and Welfare (HEW) Handbook of Public Assistance Administration (hereinafter referred to as Federal Handbook), Part IV, §§ 6200, *et seq.*

This case also involves the California Welfare and Institutions Code, the following portions of which are set forth in Appendix III, *infra*, pp. 14a-18a:

Cal. W & I § 12200
Cal. W & I § 12201
Cal. W & I §§ 10950-10965.

This case also involves the California State Department of Social Welfare Public Social Services Manual (hereinafter referred to as PSS) § 44-325.43, set forth in Appendix IV, *infra*, pp. 19a-20a.

STATEMENT

Appellant Wheeler, an elderly widow, suffering from heart disease and diabetes, lives alone in an apartment leased to her by the San Francisco Housing Authority [A. 41]. She survives solely on her welfare check of $113.95 per month and her monthly Social Security payment of $44.60 [A. 24, 56]. Mrs. Wheeler received her monthly welfare check (termed Old Age Security) for almost nine years until August 1, 1967 [A. 56].[1]

On August 30, 1967, the San Francisco Department of Social Services (hereinafter referred to as the Welfare Department) learned from an anonymous caller that Mrs.

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1. The Old Age Security program is administered by the county welfare departments in accordance with the rules of the California Department of Social Welfare under the direction of appellee John Montgomery. The rules and regulations of the California Department are established pursuant to the California Welfare and Institutions Code, and in conformity with the requirements of the Social Security Act and with the rules and regulations promulgated by HEW, 49 Stat. 620 (1935), as amended, 42 U.S.C. § 302; see also HEW Federal Handbook. The Old Age Security program is one of the three major categorical public assistance programs established by the Social Security Act, the other two being Aid to Families with Dependent Children and Aid to the Totally Disabled. The programs are financed largely by the Federal Government on a matching fund basis and are administered by the states. *King v. Smith*, 392 U.S. 309, 313, 316 (1968).

Wheeler had received the proceeds of her late son's veteran's insurance policy [A. 56]. A county welfare supervisor called Mrs. Wheeler on that date and Mrs. Wheeler explained that she did not have the money as she had transferred it to her grandson to satisfy her late son's debt [A. 56]. The Welfare Department immediately withheld Mrs. Wheeler's September 1, 1967 welfare check, leaving her to subsist on her $44.60 per month Social Security payments [A. 24, 56].

On September 14, 1967, Mrs. Wheeler called Mr. Arthur Agnos, Assistant Director of Human Relations for the San Francisco Housing Authority, for help to have her welfare restored [A. 19]. Mr. Agnos called Mrs. Wheeler's welfare worker and was told that Mrs. Wheeler's Old Age Security check had been suspended until an investigation could be made [A. 19].

After receiving notification of the grounds for the withholding and the information needed to resume aid, on September 18, 1967, Mr. Agnos, Mrs. Wheeler, and a relative, met with the welfare worker and another representative from the Welfare Department. At this time Mrs. Wheeler presented written statements further explaining that she had not intended to deceive the Welfare Department and that she transferred the money to her grandson to carry out her late son's dying wish [A. 21].

On September 22, 1967, Mr. Agnos called the welfare worker and she informed him that additional information would be required to amplify the earlier statements. This information necessitated writing to Texas, obtaining a supplemental statement from Mrs. Wheeler's grandson, and a trip to Milpitas, California [A. 22]. On October 16, 1967, Mrs. Wheeler presented this information to the caseworker, but her aid was not restored [A. 22].

Mrs. Wheeler received no welfare whatsoever during the months of September and October 1967. In November 1967,

the Welfare Department formally confirmed its termination of Mrs. Wheeler's aid [A. 57]. Mrs. Wheeler requested a Fair Hearing[2] from the California Department and restoration of her welfare payments until a hearing could be held, asserting her lack of food, medicines and other necessities, including inadequate funds for payment of rent [A. 57]. The California Department failed to act on her request for temporary restoration of payment [A. 9].

On December 6, 1967, Judge Alfonso J. Zirpoli of the court below entered a finding that irreparable injury was being suffered by Mrs. Wheeler and issued a temporary restraining order directing the California Department and the Welfare Department to restore immediately Mrs. Wheeler's welfare assistance until a decision was rendered following the Fair Hearing to be held by a state referee [A. 23-26]. For nearly three months Mrs. Wheeler subsisted solely on her $44.60 monthly Social Security.[3]

On December 20, 1967, Judge Zirpoli entered a class action order pursuant to Fed R. Civ. P. 23(b)(2), the class being composed of all Old Age Security recipients in California,[4] and ruled that a determination by a three-judge court was required [A. 27-33].

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2. The Fair Hearing is an administrative appeal procedure required by the Social Security Act and available in all states. In the Fair Hearing the local welfare department's determination is reviewed by an impartial official of the state welfare department. See, HEW, Federal Handbook, Part IV, §§ 6200, *et seq.*, for the procedural elements embodied in the Fair Hearing (set out in full in Appendix II, pp. 3a-13a).

3. As of December 1, 1967, Mrs. Wheeler was promised a county General Assistance supplement which would have given her a total income of $98.50 per month as compared with her minimum needs under the Old Age Security program of $158.55 per month [A. 56].

4. The latest statistics available indicate that there are approximately 291,000 Old Age Security recipients in California. California Department of Social Welfare, *Public Welfare in California, Annual Statistical Report*, Table 1 (1967-68).

Mrs. Wheeler did not secure a Fair Hearing before an impartial referee on the validity of the Welfare Department's discontinuance until December 22, 1967 [A. 57]. The referee found Mrs. Wheeler's discontinuance improper, concluding that:

> "In the absence of any internal inconsistencies or other evidence to the contrary . . . it cannot be concluded that the transfer was a transfer to qualify for aid..." [A. 46-47].

Not until January 12, 1968, over four months after the discontinuance of Mrs. Wheeler's Old Age Security, did the Director of the California Department adopt the referee's decision and order full restoration of Mrs. Wheeler's welfare assistance [A. 57].

After the three-judge court convened, the California Department adopted a new regulation regarding the procedures to be followed when county welfare departments decide to withhold welfare grants. The new regulation provided recipients with a minimum of three days' notice before termination and an "opportunity to meet with the caseworker, an eligibility worker, or other responsible person" for a conference "to discuss the entire matter informally for purposes of clarification, and where possible, resolution." [A. 60-61; Appendix IV, pp. 19a-20a].

On April 19, 1968, the court below entered its final order holding that appellant Wheeler had gained the relief she sought, and that, as to the other members of the class, the newly-promulgated regulation met the requirements imposed by the Due Process Clause of the Fourteenth Amendment [A. 62-65]. On that basis the court below dismissed the action.

Appellants then brought this appeal contending that the procedure Mrs. Wheeler endured is constitutionally impermissible and that the newly-promulgated regulation does

not provide a constitutionally adequate protection against continuing recurrences of unlawful termination of welfare grants.[5]

SUMMARY OF ARGUMENT

More than ten million Americans are dependent upon public assistance. Those who are charged with the administration of public assistance programs have developed a complex of procedures by which the right to receive assistance is determined, modified and terminated. The procedures involved in the termination of assistance are particularly important because of the absolute dependency of most welfare recipients. An erroneous decision may work incredible hardship upon an innocent and dependent person.

Under such circumstances, the termination of assistance without adequate notice and a prior hearing would be intolerable. No responsible public official has suggested a return to the "gratuity" concept that characterized the Elizabethan Poor Laws. Termination is, in California, preceded by minimal notice and an opportunity to informally discuss and possibly resolve disputed factual issues. At issue in the case at bar is the constitutional and statutory adequacy of that California procedure.

Appellants contend that the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requires that the decision to terminate assistance be surrounded by procedural safeguards historically designed to protect against arbitrary official action: adequate notice, an impartial decision-maker, and the right to effectively present one's case. Appellants' action is based on the fact that these protections are not available in California until

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5. Although the new California regulation was not in effect at the time of Mrs. Wheeler's termination, it was always open to a welfare recipient to complain and confer with the local county department; Mrs. Wheeler did indeed complain and confer, but to no avail [R. 361-370].

long after the effective date of the critical decision to terminate.

The court below suggested that the existing prior informal conference, coupled with a Fair Hearing after termination, combine to meet constitutional demands. However, appellants contend that the Constitution requires a full and fair hearing before termination. Some lesser procedure cannot be raised to the dignity of a constitutionally adequate hearing by an after-the-fact proceeding.

The Social Security Act can be interpreted to require the continuation of assistance pending the Fair Hearing decision. Indeed, HEW has recently issued a regulation to that effect. This court can properly invoke the traditional liberal construction of remedial statutes and hold that the Social Security Act, in conformity with constitutional requirements, mandates the procedures set forth in the HEW regulation.

Appellants simply ask that this court once again confirm that all Americans, rich and poor alike, are entitled to the basic constitutional guarantee of due process of law.

ARGUMENT

I

DUE PROCESS REQUIRES A FULL AND ADEQUATE HEARING PRIOR TO TERMINATION. THE CALIFORNIA INFORMAL CONFERENCE DOES NOT COMPLY WITH THIS REQUIREMENT.

A. The Welfare Context and the California Informal Conference.

There are 1,200,000 welfare recipients in California. Each month the local welfare departments must make decisions affecting the amount of their grants, granting or denying special needs for furniture, household items, transportation and babysitters, their referral for employment or training, providing services, and, of course, the critical decision to terminate aid.

Welfare departments continuously investigate the eligibility of recipients.[6] This means exploring facts with the recipient, studying documents, and checking conflicting, inconsistent or incomplete information. When the Welfare Department finds there are grounds to suspect that a change has occurred which may result in ineligibility, then aid may be terminated when the department has, in its view, substantial and reliable information indicating "probable ineligibility." [PSS 44-325.421, A-51]

Once the department has made its decision to terminate aid a new California regulation provides for notice to the recipient and an opportunity for an informal discussion with the caseworker or another person in the county welfare department.[7] At this point the recipient is in danger of los-

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6. Over the years the welfare system has operated largely without judicial scrutiny on an uneducated recipient population unaware of their legal rights. See Briar, *Welfare From Below: Recipients' Views of the Public Welfare System*, 54 Calif. L. Rev. 370 (1966); Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U. L. Rev. 836 (1968); Wedemeyer and Moore, *The American Welfare System*, 54 Calif. L. Rev. 326 (1966).

The relationship between county welfare caseworkers and recipients has been described as "brittle" and "adversary." A former Assistant Secretary of HEW acknowledged that ". . . welfare workers are among those most hated in the Ghetto. . . ." *Report of the National Advisory Commission on Civil Disorders*, Bantam Books Edition (1968), at pp. 457-67.

The California experience has shown that caseworkers (who are not required to have any specialized academic training) have great power over the recipients even to the point where recipients will abandon their constitutional rights rather than risk the caseworker's disfavor. *Parrish v. Civil Service Commission of the County of Alameda*, 57 Cal. Rptr. 623, 628-30, 425 P.2d 223, 228-230 (1967). In a recent California case a county welfare department had systematically failed to inform recipients of their right to apply for welfare and their right to appeal county welfare decisions. *Diaz v. Quitoriano*, 74 Cal. Rptr. 358 (1969), and in *County of Contra Costa v. Social Welfare Board*, 40 Cal. Rptr. 605 (1964), county welfare workers terminated a recipient because she refused to take a lie detector test.

7. PSS 44-325.43 (the reglation challenged herein), *infra*, Appendix IV, pp. 19a-20a.

ing her means of survival—the monthly welfare grant upon which she depends.

A recipient who claims the Welfare Department's action is wrongful and believes herself still eligible for aid must rely on the safeguards embodied in the challenged regulation for her only protection prior to the termination of her welfare grant. However, the regulation is so weak and lacking in procedural protections that there are no effective means established by which a recipient who disputes the department's action can prevent the termination of her grant.

The conference itself is not scheduled for a particular time or with a particular person. The notice does not inform the recipient of her right to appear. The operative language of the notice reads as follows:

> "It is not necessary for you to see us about this notice unless there are facts relating to your needs and/or income or facts which may otherwise affect your eligibility that you have not reported to us. If you have a question about this action and wish to discuss it, please telephone or write to us. We will answer your question or make an appointment to see you in person."[8]

If a recipient knows of the conference procedure and arranges for it, then she will get to see her caseworker, perhaps one day before her check is discontinued. At this time the recipient first learns the basis of the case against her and must respond to it. There is no requirement that there be a record kept of the conference or that any decision, written or otherwise, be rendered. In some cases the caseworker cannot reverse the original decision to terminate even if convinced at the conference. For example, Mrs.

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8. A form of notice sent to terminated recipients is attached to this brief as Appendix V, pp. 21a-22a.

Wheeler, after she presented affidavits and appeared personally before her caseworker, was told that her assistance would be restored. She was later telephoned and told that higher department personnel had confirmed the earlier decision to terminate [A. 22].

Welfare officials face understandable pressure to limit the caseload and reduce costs, both of which make local welfare agencies all the more inclined in cases of doubt to deny or terminate rather than to continue aid.[9] From a statewide random review of the local Welfare Department's files on recipients, the California Department's own eligibility control unit found that 5% of the recipients in the adult categories and 8% in Aid to Families with Dependent Children were erroneously terminated, while in only 1% of the cases was aid mistakenly continued.[10] The eligibility control letter states their findings mean that "a substantial number (in the thousands)" of former recipients ". . . had their assistance grants terminated prematurely." Commenting on these findings the California Assembly Office of Research and the staff of the Assembly Committee on Social Welfare said:

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9. Briar, *The Welfare Appeals System in California*, October 23, 1968 (mimeographed copy on file at the Graduate Social Welfare Library, University of California School of Social Welfare, Berkeley, California), notes as follows:

> "From an analysis of the county case loads it becomes clear that many counties become more restrictive as the fiscal year ends and their budgets become constricted. This may be documented by a general increase in county denials during April, May and June, and a parallel increase in hearing grants during these last three months in the fiscal year." At pp. 17 and 27.

Dr. Briar read, analyzed, codified and compared statistically for the relationship among them, the 1,088 California fair hearing decisions rendered in 1965-1966.

10. California Department of Social Welfare, Circular Letter # 2064, November 1967 (R. 157-162).

"... it is clear that administrative 'accountability' is interpreted as a duty to avoid ineligibility rather than as a duty to make correct determinations. This produces a wasteful emphasis on over-investigating eligibility and a *tendency toward denying legitimate claims when any doubt exists.*"[11] [Emphasis added.]

In 35% of the California post-termination hearings decided between July 1, 1968 and March 30, 1969, the county decision to terminate was reversed.[12] A comprehensive study of all California Fair Hearing decisions rendered in 1965-1966 shows that over one-fifth (1/5) of all recipients were completely successful and one-third (1/3) of the decisions resulted in partial grants.[13]

Despite the fact that many recipients are erroneously terminated and are successful in Fair Hearings, there are relatively few Fair Hearings.[14]

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11. California State Assembly, *California Welfare: A Legislative Program for Reform*, February 1969, at p. 92.

12. The total number of reported hearings decided on all issues during this period was 1,528; twenty (20) hearings involved termination of aid. *Summary of All Fair Hearing Decisions* published by the California Department of Social Welfare; see also Bell and Norvelle, *Texas Welfare Appeals: The Hidden Right*, 46 Texas L. Rev. 223, 224 (1967), which showed that reversals in Texas Fair Hearings averaged 51% from 1958 ot 1966; Comment, *Eligibility Determinations in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania* 115 U. Pa. L. Rev. 1307, 1312-1313. (1967).

13. Briar, *Welfare Appeals Systems, Supra*, n. 9. It is significant to note that in the 1,088 decisions studied, Briar found that the rate of success of recipients was markedly higher in those cases where recipients had an authorized representative with them at the fair hearings. An average success rate of 63% occurred in cases where counsel was present; a 41% success rate for all represented clients as opposed to any overall success rate of 29%. Pp. 8-12.

14. The appeal rate in Old Age Security is 1.1 Fair Hearings per 1,000 active cases. In 1967, over 30,000 Old Age Security recipients were terminated, for reasons other than death, yet, there were only 363 Fair Hearings requested by the 291,348 Old Age Security re-

With regard to termination of benefits, one commentator has explained the failure to request later administrative review as follows:

> ". . . the brutal need of the recipient erroneously denied assistance will make him all the less able to pursue the subsequent [fair] hearing now available. Faced with the need to live somehow, he can scarcely devote the time and energy necessary to effectively show his continued eligibility on appeal. Because of this, it is hardly surprising that recipients rarely even request a hearing after the administrator stops payment." Comment: *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L.J. 1234, 1244 (1967).

In this setting, more procedural safeguards than are provided by the informal conference are needed to insure that minimal food, clothing, and shelter will not be taken from recipients until they are found to be ineligible.

B. The Elements of Due Process Required in an Adjudicative Hearing Where Livelihood Is at Issue Are Lacking in the California Informal Conference.

It is now settled beyond a reasonable doubt that welfare procedures, as other governmental functions, are subject to constitutional demands. See, *e.g., Sherbert v. Verner,* 374 U.S. 398, 404 (1963); *Shapiro v. Thompson,* ..... U.S. ....., 89 S.Ct. 1322 (1969).

At the least, the Constitution demands that before a public official terminates or suspends welfare payments, he must

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cipients on all issues including termination. In all categorical public assistance programs the appeal rate, calculated on the basis of the average total number of recipients, was less than four per 1,000 active cases. The total number of Fair Hearings requested was 3,931. California Department of Social Welfare, *Public Welfare in California, Annual Statistical Report,* Tables 4, 5, and 61 (1967-68).

invoke procedures traditionally believed to protect against arbitrary governmental decision making. In the welfare context, no less than others, the protection of due process of law is elementary.

The lower court dismissed this action holding that the combination of the informal conference prior to termination and the Fair Hearing two months or more after termination would jointly create due process of law. Appellants seek the opportunity for an effective and timely Fair Hearing before termination (or, in the words of the HEW regulation, *infra*, pp. 25-26 "the continuation of aid pending the fair hearing"). The informal conference with a Welfare Department caseworker does not provide such a remedy and hearings provided months after termination cannot undo the harm done by the erroneous denial of a subsistence grant.

When dealing with essential interests such as the right to subsistence or the right to one's livelihood, adequate procedural protections must be required before action can be taken to withhold an individual's income unless a vital state interest exists. This proposition has most recently been recognized in the case of *Sniadach v. Family Finance Corporation*, 37 U.S. L.W. 4520 (June 9, 1969), where the court held that prejudgment garnishment is unconstitutional because notice and an opportunity to be heard were not given before the seizure of wages. The decision, voiding the prejudgment garnishment, was issued despite the fact that a limited procedure to challenge the garnishment was provided before trial.[15]

The Anglo-American legal tradition has always viewed the "hearing" process as necessary to protect against discretionary abuse, to correct harm before it is worked, and

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15. See Dissent of Mr. Justice Black at 37 U.S.L.W. 4520, 4522 and the decision of the Wisconsin Supreme Court, 37 Wisc. 2d 163, 154 N.W. 2d 259 (1967).

to avoid arbitrary erosion of individual rights. *Sniadach v. Family Finance Corporation, supra* at 4521 (concurring opinion, Mr. Justice Harlan). Welfare is no exception to this rationale; to the contrary, the dangers of error, abuse and invasion are greater due to the dependent relationship between the individual recipient and the Welfare Department. Indeed, the questions regarding eligibility and termination involve a host of individual factual determinations; determinations which customarily require a trial-type hearing.[16]

In the instant case appellants' interest in securing a Fair Hearing before termination is that of survival. On the other hand, the state apparently has no substantial interest in denying such a hearing prior to termination.[17] Of course, considerations of administrative need are relevant in the quest for a rational application of the Due Process Clause. However, this court has, on many occasions, noted that administrative convenience cannot be invoked to justify invasions of important legal rights where alternative and less harmful means are available. *Shapiro v. Thompson, supra; Cf., Harman v. Forsennius,* 380 U.S. 528, 542-43 (1965); *Carrington v. Rash,* 380 U.S. 89, 96 (1965); *Oyama v. California,* 332 U.S. 633, 646-47 (1948).

As a result of the decision in the state court case of *McCullough v. Terzian,* No. 379011 Cal. Super. Ct., Alameda

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16. Davis, *Administrative Law*, §§ 701-705 (1958 and Supp. 1965). Although such hearings may be informal, the more informal the proceeding the greater the need for basic procedural protections. *I.C.C. v. Louisville & Nashville R.R.*, 227 U.S. 88, 93 (1913).

17. The most apparent justification, that of protection of the fisc, has been rejected by appellees. In a document filed in the California District Court of Appeal in the case of *McCullough v. Terzian*, the California Attorney General stated that costs to California are not relevant to the question of whether California's informal conference meets due process. *Opposition to Introduction of Additional Evidence*, dated June 12, 1969, filed in Ct. of App. of Calif., 1st Dept., Div. 3 [1 Civ. No. 25830].

Cty., May 1968 (ruling the same informal conference to be unconstitutional), California has operated for over a year with a system allowing aid to continue pending the Fair Hearing decision. No substantial dislocation of the administrative agency has been experienced.[18] The California experience graphically undercuts the contention that a substantial state interest would be affected if aid continued pending the Fair Hearing. On the other hand, a review of the procedures at issue demonstrates that the informal conference lacks the most basic elements of due process.

1. THE INFORMAL CONFERENCE FAILS TO PROVIDE BASIC ELEMENTS OF DUE PROCESS FOUND BY THIS COURT TO BE CONSTITUTIONALLY REQUIRED IN CASES CALLING FOR ADJUDICATIVE HEARINGS.

a. Right to adequate notice.

Neither the notice nor time provided for preparation under the California regulation allows for a meaningful hearing.[19] To be constitutionally adequate the notice must clearly state the specific reasons for the action and must inform the recipient of the nature of the adverse evidence so as to enable him to adequately prepare for the hearing:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity

18. Since the *McCullough* procedure came into effect, by the state's own figures, for the period September 20, 1968, to April 30, 1969 (eight months), 55 recipients in California had aid continued pending the Fair Hearing. California Department, Research and Statistics Division, *Restoration of Aid Payments Following Filing of Affidavit: Cases and Amounts of Monthly Payment by County*, Table B (May 6, 1969).

19. Indeed, the short period of time allowed for preparation before the conference underscores the point that the conference is nothing more than an adjustment procedure for obvious misunderstanding and a place where recipients can learn (for the first time) the basis for the county's action. Such a procedure may be administratively desirable but it cannot substitute for a hearing where serious factual disputes regarding eligibility for assistance can be adjudicated prior to the termination of a welfare grant.

> to know the claims of the opposing party and to meet them." *Morgan v. U.S.*, 304 U.S. 1, 18-19 (1938).

See also *Willner v. Committee on Character and Fitness*, at 373 U.S. 96, 107 (1962).

Notices issued in California pursuant to the present regulation contain as the complete reason for termination such statements as "Failure to cooperate," "Failure to provide essential information," "Discontinued due to increased personal property," or "You are no longer disabled." [See Appendix V, p. 21a for form of notice authorized by the regulation.] These notices are permitted by the regulation to arrive as little as three mail delivery days prior to the usual delivery date of a recipient's monthly check. It is impossible in this time to obtain legal representation, assemble witnesses, review the case record, and gather the facts and materials necessary for an adequate preparation of the recipient's case. In this regard, the amount of preparation needed for Mrs. Wheeler's conference is instructive [A. 21-22]. Yet, California gives a welfare recipient a minimum of two days to prepare to argue for her livelihood.

b. The right to cross-examine and confrontation.

There is no provision for cross-examination or confrontation in the informal conference even in cases where the Welfare Department is relying on third-party information for its decision to terminate. The right to cross-examine and confront in adjudicative hearings has been traditionally required by this court, particularly where there were important consequences to an individual, such as loss of livelihood. See *Greene v. McElroy*, 360 U.S. 474, 496-97 (1958) and cases cited therein; *Willner v. Committee on Character and Fitness, supra*, 103-104; *Cf., Hannah v. Larche*, 363 U.S. 420, 441-42 (1960); as well as the lower Federal courts, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir.

1964); *Southern Stevedoring Co. v. Voris,* 190 F.2d 275 (5th Cir. 1951). The loss of a recurring subsistence grant is directly analogous to, and, if anything, more extreme, than deprivation of livelihood.

A frequently-cited formulation of the importance of confrontation and cross-examination appears in *Greene v. McElroy, supra,* where this court reviewed the procedure by which an individual had been deprived of his livelihood by removal of his security clearance. The court stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots." 360 U.S. at 496.

Even in cases where national security is involved and this court has been more reluctant to require the fullest form of confrontation, confrontation has, nonetheless, been considered critical. See, *e.g., Greene v. McElroy, supra.*

The necessity for such protection for welfare recipients is clear. Often information contained in case records is second or third-party hearsay and yet becomes the basis for the termination of welfare aid. For example in *Rios v. Hackney,* 294 F.Supp. 885, (N.D. Tex. 1967), a hearing officer confirmed the termination of aid on the basis of exclusively hearsay evidence. He found that the recipient

under the Texas' "substitute father" rule was cohabiting with a man not the legal father of her children. When this ruling was challenged, the Court's findings of fact showed:

"....

"(4) The only evidence before the examiner that plaintiff was cohabiting with a man as aforesaid was the written report of a public welfare caseworker in which it was related that several people had told the caseworker that plaintiff Modesta Rios was cohabiting with a man as aforesaid;

"(5) Plaintiff Modesta Rios denied the truth of the contents of the caseworker's report;

"(6) The persons who allegedly reported to the caseworker that plaintiff Modesta Rios was cohabiting with a man did not appear at the hearing and were not available for cross-examination by plaintiffs;"

From these facts the court concluded as a matter of law that:

"No evidence was adduced at the hearing conducted by the examiner upon which plaintiffs could reasonably be denied the relief sought therein;

"The action of the appellate board of the Texas Department of Public Welfare denying plaintiffs the relief sought was arbitrary and capricious;

"The evidence contained in the caseworker's report could not in any manner be relied upon as a basis for denying the relief sought in the absence of the plaintiffs being given an opportunity to cross-examine the person who made the statements contained in the report. *Hornsby v. Allen*, 5th Cir. 1964, 326 F.2d 605."[20] 294 F. Supp. at 886.

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20. Welfare terminations often involve factual determinations relating to third-party evidence and testimony. This is especially true where Aid to Families with Dependent Children families are discontinued because there is alleged to be a "man in the house." In Fair Hearings held subsequent to termination (where cross-examination and the subpoena power are available), 54% of the cases resulted in reversing county discontinuances of aid and restoration of grants to California recipients. Briar, *California Welfare System* at p. 18, *supra*, n. 9.

c. The right to an impartial decision maker.

The California regulation provides for an informal conference with the caseworker or another responsible person in the Welfare Department. In practice, the conference is almost always between the recipient and the same caseworker who made the initial decision to terminate welfare payments. [For example, see the informal conference provided Mrs. Wheeler (A. 21-22) and the informal conference given Mrs. McCullough (Jurisdictional Statement, Appendix G, pp. 27a-28a).] On occasion, the caseworker's direct supervisor, who has previously confirmed the decision to terminate, participates in the conference procedure.

Contrary to the view of appellees, social workers do not have interests coincident with their clients, particularly where a factual dispute exists. Indeed, the relationship between recipients and social workers is often less than cordial.[21] Appellees argued in the court below that personnel within local welfare departments could perform the several functions of caseworker, supervisor and impartial arbiter.[22] If the local department performs these functions, at the very least there must be separation of function and lack of prior involvement in the initial decision to terminate. This principle of separation of function finds clear expression in the HEW Fair Hearing. Federal Handbook, Part IV, Section 6300(h). So important is the principle to administrative fairness that Mr. Justice Jackson in *Wong Yang*

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21. Supra, n. 6.

22. But see *In re Murchison*, 349 U.S. 133, 136-37 (1955), where this court recognizes that due process requires a referee who is not both investigator and judge, arbiter and advocate in the same cause.

Sung v. McGrath, 339 U.S. 33, 41-45 (1950) said that it was the basic purpose and principal contribution of the Administrative Procedure Act.[23]

d. Other elements of due process.

The California regulation lacks other elements of due process usually found in administrative hearings. It fails to require that a decision be based upon the evidence at the hearing[24] or that there even be a decision;[25] it fails to provide for any transcript or record of any sort of the proceeding[26] and it fails to place the burden of proof on the Welfare Department. (On the contrary, the burden is upon the recipient to prove she is entitled to a continuation of public assistance.)[27]

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23. In *Kelly v. Wyman*, 294 F. Supp. 893, 907 (S.D.N.Y. 1968), the three-judge court recognized that some prior involvement might be permissible, but under no circumstances would the *Kelly* court have constitutionally approved a regulation authorizing a client's caseworker or supervisor to preside at the informal conference.

24. *I.C.C. v. Louisville & Nashville R.R.*, 227 U.S. 88, 91 (1913).

25. Under the terms of the California regulation, the informal conference is "held . . . *to discuss the entire matter informally for purposes of clarification, and where possible, resolution.*" (Emphasis added.) PSS 44-325.434(c). Thus, if the matter cannot be clarified or if a factual dispute still exists, aid will not continue pending the Fair Hearing but will be terminated.

26. See *Kwock Jan Fat v. White*, 253 U.S. 455, 464 (1913). A record is needed to protect against arbitrary action, particularly where a hearing decision is subject to judicial review which, of course, would be the case if appellants prevailed and a single effective hearing was provided prior to termination.

27. The regulation specifically requires the recipient to carry the burden of re-establishing eligibility for welfare assistance. Once a person has been found eligible for assistance that individual has a statutory right to assistance promptly and without interruption. *Smith v. King*, 277 F. Supp. 31, 38-40 (1967), *aff'd* 392 U.S. 309 (1968). Such a right is meaningless if it can be destroyed by an initial *ex parte* decision to terminate aid, thereby once again placing the burden of proof on the recipient.

In short, to simply denominate the informal conference procedure, a "hearing" does not make it a hearing that conforms to the requirements of the Due Process Clause.[28]

2. DUE PROCESS PRINCIPLES ESTABLISHED BY THIS COURT HAVE BEEN APPLIED BY A GROWING NUMBER OF LOWER COURTS TO REQUIRE A FULL AND ADEQUATE ADJUDICATIVE HEARING BEFORE TERMINATION OF WELFARE ASSISTANCE.

A growing number of lower courts have found, contrary to the holding of the court below, that essential constitutional protections such as adequate and specific notice, the right to confront and cross-examine, and the right to an impartial tribunal, are required in a hearing before termination of welfare assistance. See, *e.g., Kelly v. Wyman, supra; McCullough v. Terzian, supra* (decision set out in full in Jurisdictional Statement, Appendix H, pp. 30a-33a, holding the challenged California informal regulation to be violative of due process); *Robertson v. Born,* Civil Action No. 51364, (N.D. Cal., June 21, 1969) (ordering a full hearing prior to termination of county welfare grants).[29]

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28. The authors of a recent law journal article concluded after extensive research that a public assistance hearing must contain, at a minimum, the following elements: Notice, discovery, right to counsel, oral hearing, confrontation, cross-examination, impartial tribunal, decision on the record and judicial review. Burrus and Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance; The District of Columbia Experience,* 16 Am. U.L. Rev. 199, 218 (1967); see also Note: *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L.J. 1234, 1239 (1967).

29. In addition to the cases cited above, a number of courts have required that welfare assistance must continue pending the HEW Fair Hearing. *Machado v. Hackney,* Civ. Action No. 68-108-SA (W.D. Texas, May 12, 1969); *Moore v. Houston,* No. 104435 (Mich. Cir. Ct., Wayne Cty., Nov. 1, 1968); *Camerena v. Dept. of Public Welfare,* No. 1 CA-CIV 719 (Ariz. Ct. of App., Div. 1, filed Jan. 28, 1969). After suits were filed in Mississippi (*Williams v. Gandy,* Civ. No. G.C. 6728, N.D. Miss., filed June 9, 1967), and Massachu-

These procedural protections are also found in the HEW Fair Hearing. Specifically, the Fair Hearing contains the following basic elements: Review of the local determination by an impartial official of the state welfare department; complete and effective notice; the decision to be based solely on the evidence adduced at the hearing; adequate time for discovery and inspection; opportunity to question or refute testimony or evidence and a prompt decision. HEW, Federal Handbook, Part IV, §§ 6200, *et seq.* (set out in full in Appendix II, pp. 3a-13a).

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setts (*Diaz v. Dunn*, No. 68411, D.C. Mass., filed May 15, 1968), the state welfare departments adopted a regulation authorizing the continuation of assistance pending the Fair Hearing. Finally, three-judge courts have been convened in several other states. *See, Van Blaricum v. Dept. of Public Welfare of the State of Ohio*, No. 68-78 (S.D. Ohio, May 5, 1968); *Lage v. Downing*, C.A. No. 7-2089-C-2 (S.D. Iowa, 1968); *Sims v. Juras*, No. 69-238 (D.C. Ore., April 30, 1969); *Miller v. Zoeller*, No. 69-C-2 (W.D. Wis., order filed Jan. 20, 1969); and see, *Bible v. Smith*, No. 706263 (Wash. Super. Ct., March 18, 1969).

II

CONTINUATION OF WELFARE ASSISTANCE PENDING A FAIR HEARING DECISION IS REQUIRED BY THE SOCIAL SECURITY ACT.

Appellants strongly urge that the court should reach and decide the important constitutional issues raised by this case. However, the relief appellants seek can be achieved by a proper interpretation of the Social Security Act.

The Social Security Act's guarantee of a Fair Hearing to all categorical aid recipients can reasonably be construed to require the opportunity for a Fair Hearing prior to the termination of welfare assistance.[30]

HEW has so construed the Social Security Act to require the continuation of aid pending the Fair Hearing decision. *Cf., Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281-83 (1969). Recently, HEW issued the following regulation which states in pertinent part (set out in full in Appendix II, p. 3a).

"Effective October 1, 1969, a State plan for OAA, AFDC, AB, APTD, AABD, or MA under the Social Security Act must provide that:

> "(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case between the agency and the appellant, assistance will be continued during the period of the appeal and

30. For the federally-supported welfare programs, Aid to Families with Dependent Children, Old Age Security, Aid to the Totally Disabled, and Aid to the Blind, every state must provide an opportunity to recipients for a Fair Hearing to contest the denial or termination of aid. 42 U.S.C.A. §§ 302(a)(4), 602(a)(4), 1202(a)(4), and 1382(a)(4) (1964).

> "[A state OAS plan must . . .] . . . provide for granting opportunity for a fair hearing before the State agency to any individual whose claim for assistance under the plan . . . is denied or is not acted upon with reasonable promptness." 42 U.S.C.A. § 302(a)(4).

through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of the appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance." (Vol. 34, Fed. Reg., No. 16, p. 1144, Jan. 23, 1969.)[31]

HEW adopted this regulation after extensive analysis and review of the needs of recipients and the welfare departments, and after soliciting the views of interested members of the public.[32] The regulation is consistent with the purposes of the Social Security Act, with the constitutional mandate that Fair Hearings satisfy the standards of due process appropriate to the situation, and with Part IV, Section 6400(a) of the Federal Handbook which intends that the Fair Hearing be subject to the requirements of due process. The purpose of the Social Security Act is to promote the economic and psychological self-sufficiency of those who must be dependent on public aid. See 42 U.S.C. §§ 601 and 1351 (1964). Arbitrariness in public administration is a debilitating force which makes for servility or alienation in those who are subject to it. Such a result is repugnant to the Social Security Act.

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31. HEW provides for Federal reimbursement to states granting welfare assistance pending a Fair Hearing decision. Federal Handbook, Part IV, § 6500(b).

32. The regulation was originally issued in proposed form on November 30, 1968 (33 Fed. Reg. at 17853), with a proposed effective date as of July 1, 1969. When the regulation was finally adopted the effective date was set back to October 1, 1969, presumably to allow those states where no such system existed to adapt to the new procedure.

A reasonable construction is that the Fair Hearing requirements of the Social Security Act mean a hearing held at a time meaningful to the preservation of the claimant's subsistence, *i.e.*, prior to termination of assistance. Such an interpretation would be consistent with due process considerations underlying construction of statutes open to interpretation. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, (1949), particularly pp. 48-51; *Greene v. McElroy*, 360 U.S. 474, 507-508 (1958); *King v. Smith*, 392 U.S. 309, 334 (1968). Indeed, a three-judge court has recently decided continuation of aid pending a Fair Hearing decision is required by the Social Security Act. *Machado v. Hackney*, Civ. Action No. 68-108-SA (W.D. Texas, May 12, 1969).[33]

CONCLUSION

Due process protections in the welfare context are essential. The recipient's dependency on the welfare agency, her lack of resources, her inability to effectively articulate her position, the factual nature of the issues presented, and the extent of the injury which a recipient will suffer, must all be considered in determining the extent to which procedural safeguards are required. As Mr. Justice Frankfurter noted in his concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951):

> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is

33. It is clear that state statutes or regulations inconsistent with the Social Security Act or HEW regulations are invalid *King v. Smith, supra.*

challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment." 341 U.S. at 163.

The informal conference is not scheduled at a designated time, or with a designated representative of the Welfare Department. The informal conference does not provide adequate notice. Serious factual questions are raised and determined at the informal conference with no advance opportunity for the recipient to know the precise grounds for termination, nor the source of the evidence supporting termination. No right to cross-examination is afforded; there is no transcript of the informal conference; and no requirement that the decision, if rendered at all, be rendered by someone other than the person who made the original decision to terminate, or be based upon the evidence presented at the informal conference. Thus, the informal conference hardly rises to the dignity of due process of law. To afford a hearing long after the injury has been done to the recipient does not remedy the constitutional infirmity.

The Social Security Act can be interpreted to require the continuation of welfare assistance pending the Fair Hearing thus providing recipients with a realistic and effective remedy prior to termination. As Professor Charles A. Reich has written:

> "In a society where a significant portion of the population is dependent on social welfare, decisions about eligibility for benefits are among the most important that a government can make. By one set of values the granting of a license to broadcast over a television channel, or to build a hydroelectric project on a river, might seem of more far-reaching significance. But in a society that considers the individual as its basic unit, a decision affecting the life of a person or a family

should not be taken by means that would be unfair for a television station or power company. Indeed, full adjudicatory procedures are far more appropriate in welfare cases than in most of the areas of administrative procedure." Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1253 (1965).

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX I

Excerpts from the Social Security Act of 1935, as amended, 42 U.S.C. § 302(a)(4) et seq.

§ 302(a)(4)

(a) A State plan for old-age assistance, or for medical assistance for the aged, or for old-age assistance and medical assistance for the aged must—

(4) Provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for assistance under the plan is denied or is not acted upon with reasonable promptness . . .

§ 602(a)(4)

(a) A State plan for aid and services to needy families with children must—

(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim is denied or is not acted upon with reasonable promptness; . . .

1202(a)(4)

(a) A State plan for the blind must—

(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to the blind is denied or is not acted upon with reasonable promptness; . . .

1382(a)(4)

(a) A State plan for aid to the aged, blind, or disabled, or for aid to the aged, blind, or disabled and medical assistance for the aged must—

(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid or assistance under the plan is denied or is not acted upon with reasonable promptness; . . .

APPENDIX II

Excerpts from 25 C.F.R. § 205.10, and from Part IV of The Handbook of Public Assistance Administration, United States Department of Health, Education and Welfare.

1. 25 C.F.R. § 205.10:

Fair Hearings: Legal Services; Continuing Assistance

(a) STATE PLAN REQUIREMENTS: Effective October 1, 1969, a State plan for OAA, AFDC, AB, APTD, AABD, or MA under the Social Security Act must provide that:

(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance.

2. Federal Handbook, §§ 6200, et seq.:

6200. *Requirements for State Plans*

A State plan for OAA, AFDC, AB, APTD, or AABD must provide that:

(a) The State agency will be responsible for fulfillment of fair hearings provisions, and shall specify the hearing authority.

(b) An opportunity for a fair hearing before the State agency will be granted to any individual requesting a hearing because his claim for assistance is denied,

is not acted upon with reasonable promptness, or because he is aggrieved by any other agency action affecting his receipt or termination of assistance, or by agency policy as it affects his situation.

(c) Decisions by the hearing authority, rendered in the name of the State agency, will be binding on the State and local agency. The State agency will establish and maintain a method for informing, at least in summary form, all local agencies of all fair hearing decisions by the hearing authority, and the decisions will be accessible to the claimants, their representatives, and the public (subject to provisions relating to safeguarding public assistance information).

(d) The hearings will be conducted by an impartial official (or officials) of the State agency.

(e) Hearing procedures will be issued and publicized by the State agency for the guidance of all concerned.

(f) Every claimant will be informed in writing at the time of application and at the time of any agency action affecting his claim

(1) of his right to a fair hearing;

(2) of the method by which he may obtain a hearing;

(3) that he may be represented by others including legal counsel; and

(4) of any provision for payment of legal fees by the agency.

(g) The hearing will be conducted at a time, date, and place convenient to the claimant, and adequate preliminary written notice will be given.

(h) When the hearing involves medical issues, a medical assessment other than that of the person or persons involved in making the original decision will be obtained and made a part of the record if the hearing officer or the appellant considers it necessary.

(i) The claimant or his representative will have the opportunity

(1) to examine all documents and records used at the hearing;

(2) at his option, to present his case himself or with the aid of others, including legal counsel;

(3) to bring witnesses;

(4) to establish all pertinent facts and circumstances;

(5) to advance any arguments without undue interference; and

(6) to question or refute any testimony or evidence.

(j) Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing. The claimant will be notified of the decision, in writing, in the name of the State agency and, to the extent it is available to him, of his right to judicial review.

(k) When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, the agency will make the corrected payments retroactively to the date the incorrect action was taken.

(l) The hearing officer's (or panel's) recommendations shall be based exclusively on evidence and other material introduced at the hearing. The verbatim transcript of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, and the hearing officer's or panel's recommendations, will constitute the exclusive record for decision by the hearing authority and will be available to the claimant at a place accessible to him or his representative at any reasonable time.

6300. *Criteria for the Administration of the Plans*

(a) The State agency establishes policies and procedures that carry out the purpose and provisions of

this policy and that assure equity of treatment in relation to the laws and standards pertaining to assistance.

The State agency takes the necessary steps to see that there is uniformity in the application of agency policy in similar situations.

(b) A request for a hearing is considered as any clear expression (oral or written) by the claimant (or person acting for him, such as his legal representative, relative, or friend) to the effect that he wants an opportunity to present his case to higher authority. The freedom to make such a request is not limited or interfered with in any way, and agency emphasis will be on helping the claimant in submitting and processing his request, and in preparing his case, if needed.

(c) Opportunity for a fair hearing includes:

(1) Consideration of any action, or failure to act with reasonable promptness, on a claim for assistance which includes undue delay in reaching a decision on eligibility or in making a payment, refusal to consider a request for or undue delay in making an adjustment in payment, and suspension or discontinuance of assistance in whole or in part;

(2) Consideration of the agency's interpretation of the law, and the reasonableness and equitableness of the policies promulgated under the law, if the claimant is aggrieved by their application to his situation;

(3) Consideration of agency decisions regarding:

(i) Eligibility for assistance in both initial and subsequent determinations,

(ii) Amount of assistance or change in payments,

(iii) The manner or form of payments, including restricted or protective payments, even though no Federal financial participation is claimed, and

(iv) Conditions of payments, including work requirements.

(d) Provision is made for reasonable time in which to appeal agency action.

(e) Final administrative action is taken within the 60-day limit (IV-6200, item j), except that where the claimant requests a delay in the hearing in order to prepare his case or for other essential reasons, reasonable time is given and such extra time may be added to the 60 days.

(f) The agency does not deny or dismiss a request for a hearing except where it has been withdrawn by the claimant in writing or abandoned.

A request for a hearing is considered abandoned only if neither the claimant nor his representative appears at the time and place agreed upon for the hearing and if within a reasonable time after the mailing of an inquiry as to whether he wishes any further action on his request for a hearing, no reply is received by either the local or State agency.

(g) The hearing authority may be the highest executive officer of the State agency, a panel of agency officials or a hearing officer appointed for that purpose, but no person who participated in the local decision being appealed will participate in a final administrative decision on such case. The hearing authority is responsible for a final administrative decision in the name of the State agency on all issues that have been the subject of a hearing. The decision of the hearing authority is binding on the State and local agency. The State agency is responsible for seeing that the decision is carried out promptly.

Insofar as may be applicable, a decision in favor of the claimant applies retroactively to the date the incorrect action was taken, and also applies prospectively.

(h) The impartial official (or officials) of the State agency who is responsible for conducting the hearing has not been involved in any way with the action in question.

(i) The issuance of hearing procedures is in the form of rules and regulations, or in some other form in which they will be publicized.

(j) Written notification and, to the extent possible, oral explanation of the right to and procedure for requesting a fair hearing are given at the time of application. Written notice, and oral explanation as necessary, are given at the time of any agency action affecting the claim for assistance, including change in or termination of assistance.

(k) Individuals are informed of their right to be represented at fair hearings by others. At his option, the claimant may be represented by legal counsel or by a relative, friend or other spokesman, or may represent himself.

(l) The convenience of the claimant is considered in setting the date, time and place for the hearing. Notice is given in writing with adequate preliminary information about the hearing procedure necessary for his preparation for the hearing and effective presentation of his case. He is advised as to the use of witnesses and legal counsel or other representative, as well as any procedure or financial provisions for obtaining legal representation, including availability of fees for legal counsel from the agency.

(m) When an assessment by a medical authority, other than the one involved in the decision under question, is requested by the claimant, it is obtained, at agency expense, from a medical source satisfactory to the claimant. The hearing officer can also consider the physician's report in the record or can request additional evidence. The assessment of such medical authorities will be reported in writing or by personal testimony as an expert witness for the hearing record.

(n) The claimant or his representative has adequate opportunity to examine material that will be introduced as evidence prior to the hearing as well as during the hearing, to give all the evidence on points at

issue he believes necessary without undue interference, to as for substantiation of any statements made by others, and to present evidence in rebuttal.

(o) Non-record or confidential information which the claimant does not have an opportunity to hear or see is not made a part of the hearing record or used in a decision on the appeal. The hearing officer does not review the case record, or other material prior to the hearing unless such material is made available to the claimant or his representative.

6400. *Interpretation*

(a) *Opportunity for a Fair Hearing*

Fair hearing procedures, including the conduct of the hearing, are designed to assure the right of every claimant to demand and obtain a fair hearing. The claimant's freedom to request a hearing, whenever he believes that proper consideration has not been given to all the circumstances surrounding his claim, is a fundamental right and is not to be limited or interfered with in any way.

Since, under the Federal act and the State plan, every aggrieved claimant is entitled to the opportunity for a hearing, only the claimant may withdraw his request for a hearing and this is to be in the form of a written withdrawal.

Effective complaint and adjustment procedures, whereby corrective action may be easily requested and readily taken without the need for a hearing, are necessary, when indicated. Advance opportunity afforded the recipient to respond to questions which could result in change of grant or termination is a significant part of such procedures. So is written, and whenever practical, oral information of the reasons for change, denial, or termination. This is particularly important where the agency decision is based on judgmental factors or eligibility requirements that entail evaluative

decisions on the part of workers, as compared to decisions based on non-debatable facts (such as receipt of OASI, death, etc.). However, the State and local agency adjustment procedures cannot be allowed to interfere with the hearing process.

The claimant's right to a hearing includes the privilege of presenting his case in any way he desires. Some will wish to tell their story in their own way, some will desire to have a relative or friend present the evidence for them, and still others will want to be represented by legal counsel. In many instances the recipient's position can best be presented by an attorney. In order for the claimant to obtain an attorney, legal fees may need to be provided by the State. Federal financial participation is available in meeting the cost of these fees. States are urged to provide payment for the services of an attorney, or refer recipients to attorneys otherwise available in the community, because of the skill and knowledge of the legal profession in these matters. Furthermore, the claimant may bring any witnesses he desires to help him establish pertinent facts and to explain his circumstances.

The hearing is conducted in an informal rather than formal court-type procedure in order to serve the best interests of the claimant; however, the hearing is to be subject to the requirements of due process.

(b) *Publication of Hearing Procedures*

The publicaton of hearing procedures in the form of rules and regulations or a clearly stated pamphlet helps to emphasize the importance of the procedure. This material is useful to applicants and recipients or to others interested in their behalf. It contributes to the fairness of the hearing procedure, and emphasizes that there is "due process" in program administration affecting the right to public assistance.

(c) *Informing the Claimant of His Right to a Hearing*

Written notification of the right to a hearing may be on the application form and other forms routinely used by the agency which go to applicants and recipients, as well as an explanatory pamphlet distributed by the agency. Oral explanations should also be given regarding the policy on hearings at intake and at time of a change in eligibility.

The purpose of informing the claimant of his right to a hearing, in writing, and whenever practicable orally, is to assure that the claimant fully understands this right. This right is further assured by the agency explaining the right to a hearing in understandable terms and in being helpful as needed in the preparation for and conduct of the hearing.

(d) *Convenience of the Claimant Considered*

The agency has not discharged its responsibility for a hearing unless it has taken all steps necessary to enable a claimant who requested a hearing to attend the hearing in person or to be represented by a person of his own choosing. If the hearing is to be held at a considerable distance from the locality of the claimant's residence, it may be necessary to provide for the transportation and other costs of the claimant, his representative, and his witnesses.

Notice to claimant as to the hearing being scheduled in his behalf includes information about the fair hearing as an informal administrative procedure, in which a dissatisfied claimant or his representative may present his grievance with the help of witnesses or legal representation to show why action or inaction in his case should be corrected by the State agency.

(e) *Impartiality of Official Conducting the Hearing*

The person conducting the hearing shall not have been connected in any way with previous actions or decisions on which the appeal is made. For example, a

field supervisor who has advised the local agency in the handling of a case would be disqualified from acting as the hearing officer.

(f) *Impartiality of the Hearing Authority*

The hearing authority shall not have been directly connected with the agency action about which the claimant is appealing.

(h) *Opportunity to Examine the Official Record*

The record of the proceedings at the hearing, which constitute the official record, is to be made available to the claimant or his representative to examine, if he desires. If any additional material is made a part of the hearing record, this, too, would be made available.

(i) *Judicial Review*

In some States, the right of judicial review may be prescribed by statute specifically authorizing review of the agency decision on the basis of the record of administrative proceedings. In other States, even in the absence of statutory provisions, a claimant may be able to invoke the remedy of judicial review on the showing that the agency action was "unreasonable, arbitrary, or capricious." The content of the notice of decision, as regards judicial review, would depend upon the kind of remedy available in the State.

6500. *Federal Financial Participation*

Federal financial participation is available in:

(a) Payments made to carry out hearing decisions, or to take corrective action prior to the hearing, including corrected payments retroactively to the date the incorrect administrative action was taken.

(b) Payments of assistance continued pending a hearing decision.

(c) Administrative costs necessary for:

(1) Carrying out the hearing procedures;

(2) Providing transportation and other costs for the claimant, his representative and witnesses to and from the place of the hearing;

(3) Fees for legal counsel; and

(4) Other costs, expenditures, and fees reasonably related to the hearing, including expenses involved in obtaining an additional medical assessment.

APPENDIX III

California Welfare and Institutions Code

1. Statutes Governing Termination of Old Age Security.

§ 12200. Grounds; report of suspension; effect of eligibility for medical assistance. The county may for cause, and upon instructions so to do by the department, shall cancel, suspend, or revoke aid. Upon request of the department, an immediate report of every suspension shall be made to the department stating the reason for the suspension and showing the action of the board of supervisors in approving the suspension.

Eligibility for medical assistance for the aged does not constitute cause for retroactive cancellation, suspension, or revocation of aid.

§ 12201. Notice to recipient. If the board of supervisors, in accordance with Section 12200, cancels, suspends, or revokes aid, the recipient shall be immediately notified in writing of the county's action, the date thereof, and of the reason therefor and the recipient's right to appeal therefrom.

2. Fair Hearing Statutes.

§ 10950. Opportunity; recipient defined. If any applicant for or recipient of public social services is dissatisfied with any action of the county department relating to his application for or receipt of aid or services, or if his application is not acted upon with reasonable promptness, or if any person who desires to apply for such aid or services is refused the opportunity to submit a signed application therefor, and is dissatisfied with such refusal, he shall, in person or through an authorized representative, without the necessity of filing a claim with the board of supervisors,

upon filing a request with the department, be accorded an opportunity for a fair hearing.

As used in this chapter, "recipient" means an applicant for or recipient of aid or services except aid or services exclusively financed by county funds.

§ 10951. Request; time. No person shall be entitled to a hearing pursuant to this chapter unless he files his request for the same within one year after the order or action complained of.

§ 10952. Setting; notice. The department shall set the hearing to commence within 45 days after the request is filed, and, at least 10 days prior to the hearing, shall give all parties concerned written notice of the time and place of the hearing.

§ 10953. Conduct. A hearing under this chapter shall be conducted by referees employed by the department, unless the director orders that it shall be conducted by himself or by the administrative adviser of the department in behalf of the director.

§ 10954. Powers of person conducting. The director, administrative adviser, or referee, in conducting the hearing, shall have all of the powers and authority conferred upon the head of a department in Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.

§ 10955. Impartiality; informality; evidence; appearance; counsel. The hearing shall be conducted in an impartial and informal manner in order to encourage free and open discussion by participants. All testimony shall be submitted under oath or affirmation. The person conducting the hearing shall not be bound by rules of procedure or evidence applicable in judicial proceedings. At the hearing the appli-

cant or recipient may appear in person with counsel of his own choosing, or in person and without such counsel.

§ 10956. Perpetuation of proceedings. The proceedings at the hearing shall be reported by a phonographic reporter or otherwise perpetuated by mechanical, electronic, or other means capable of reproduction or transcription.

§ 10957. Continuance; commencement of payments on award of aid. The person conducting the hearing, upon good cause shown, may continue the hearing for a period of not to exceed 30 days. When the refusal of a county to accept a signed application for aid or services is an issue, the director may require the county to accept the application, and may continue the case until the results of the investigation have been reported to him. In any such case in which aid is awarded by the director, the payments shall commence at the time indicated by the director.

§ 10958. Referee; proposed decision. If the hearing is conducted by a referee, he shall prepare a proposed decision, in writing and in such form that it may be adopted as the decision in the case, and, after approval of the decision by the chief referee of the department, shall file a copy of the proposed decision, within 75 days after the conclusion of the hearing, with the director.

§ 10959. Director's powers after receipt of proposed decision; rehearing. Within 30 days after receiving a copy of the referee's proposed decision, the director may adopt the decision in its entirety; decide the matter himself on the record, including the transcript, with or without taking additional evidence; or order a rehearing to be conducted by himself, the administrative adviser of the department or another referee in behalf of the director. If the director decides the matter, a copy of his decision shall be served on the applicant or recipient and on the affected county,

and, if his decision differs materially from the proposed decision of the referee, a copy of that proposed decision shall also be served on the applicant or recipient and on the affected county. If a rehearing is ordered, it shall be conducted in the same manner and within the same time limits specified for the original hearing.

§ 10960. Request for rehearing; time; ruling; conduct. Within 30 days after adoption by the director of the proposed decision of a referee or the issuance by the director of his own decision, the affected county or applicant or recipient may file a request with the director for a rehearing and the director, within 10 days after receipt of the request, shall grant or deny the request. If the director grants the request, the rehearing shall be conducted in the same manner and subject to the same time limits as the original hearing.

§ 10961. Director's decision; contents; effect. The decision of the director need not specify the amount of the award to be paid unless the amount of the award is an issue. If the decision is in favor of the applicant or recipient, the county department shall pay to the applicant or recipient, without the necessity of establishing his present need, the amount of aid he is entitled to receive pursuant to the director's decision, payment to commence as of the date the person was first entitled thereto, or grant to him the services to which the director finds he is entitled.

§ 10962. Judicial review. After having exhausted the administrative remedy provided for in Section 10960, the applicant or recipient or the affected county, within one year after receiving notice of the director's final decision, may file a petition with the superior court, under the provisions of Section 1094.5 of the Code of Civil Procedure, praying for a review of the entire proceedings in the mat-

ter, upon questions of law involved in the case. Such review, if granted, shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision. The director shall be the sole respondent in such proceedings.

No filing fee shall be required for the filing of a petition pursuant to this section. Any such petition to the superior court shall be entitled to a preference in setting a date for hearing on the petition. No bond shall be required in the case of any petition for review, nor in any appeal therefrom. The applicant or recipient shall be entitled to reasonable attorney's fees and costs, if he obtains a decision in his favor.

§ 10963. Compliance with decision. The county director shall comply with and execute every decision of the director rendered pursuant to this chapter.

§ 10964. Digest of decisions. The department shall compile and distribute to each county department a current digest of decisions, properly indexed, rendered under this chapter, and each such digest shall be open to public inspection, subject, however, to the confidentiality requirements set forth in federal and state laws and regulations.

§ 10965. Request on behalf of decedent's estate. Nothing in this chapter shall prevent the filing of the request for a hearing by the legal representative, or, if there is no authorized legal representative, by an heir of a deceased applicant or recipient, in behalf of the decedent's estate, to the end that rights not determined at the time of death shall accrue to the estate of the applicant or recipient.

APPENDIX IV

Excerpts from California Regulations for Withholding Welfare Payments Establishing "Informal Conference" Effective April 1, 1968.

California State Department of Social Welfare, Public Social Services Manual:

44-325 CHANGES IN AMOUNT OF PAYMENT

.43 *Notification to Recipient When Aid Payment is Withheld* (AB, ATD, OAS, AFDC)

The recipient, the parent or other person responsible for the child in *AFDC,* shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form ABCD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to re-establish eligibility or to determine a correct grant.

.432 Assurance that prompt investigation is being made; that the withheld warrant will be delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be

freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:

(a) To learn the nature and extent of the information on which the withholding action is based;

(b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

APPENDIX V
Form of Notice

STATE OF CALIFORNIA

NOTICE OF ACTION

DEPARTMENT OF SOCIAL SERVICES
585 Bush Street
San Francisco, California 94108

TYPE OF AID:
DATE: 5/28/69

Dear Mrs. [name deleted]

Your Aid to the Needy Disabled has been **discontinued** effective **May 30, 1969** because **you are no longer disabled.**

This action (if a discontinuance of aid) is based on the following specific state policy:

It is not necessary for you to see us about this notice unless there are facts relating to your needs and/or income or facts which may otherwise affect your eligibility that you have not reported to us. If you have a question about this action and wish to discuss it, please telephone or write to us. We will answer your question or make an appointment to see you in person.

Sincerely,

558-5504

.....
(Telephone Number)

(Mrs.) I. MILLS

.....
Social Worker
UNIT No. 35

ABCD 239 (7/68)
(Denied and Held Applications; Withheld, Canceled and Discontinued Aid Payments; Intra-program Status Change; and Supplemental Payments)

(Reverse side of form)

IMPORTANT INFORMATION

If you have any questions or you desire further information:

1. You may get in touch with your social worker who will be glad to discuss any questions with you. All facts and any further information you wish to present will be given careful consideration. If an adjustment is in order, it will be made.

2. You may inform the State Department of Social Welfare if you have a complaint by going in person, or writing to that office. The department will then notify the County Welfare Department. Upon receipt of such notification the County Welfare Department will review the facts in your case. If they determine that you are entitled to an adjustment, it may be possible to settle your complaint without further action on your part.

3. You may request a fair hearing and a decision by the Director of the State Department of Social Welfare. Such request must be in writing. A letter is sufficient but you must state that you want a hearing and tell why you are dissatisfied. A request for a hearing should be sent to the area office of the State Department of Social Welfare nearest your home. Area offices of the State Department of Social Welfare are located at:

   Los Angeles—State Office Bldg. No. 2, 107 S. Broadway, Los Angeles, California 90012
   Sacramento—2415 First Avenue, P.O. Box 8074, Sacramento, California 95818
   San Francisco—1407 Market Street, San Francisco, California 94103

A request for a hearing, to be considered, must be received by the State Department of Social Welfare within one year of the postmarked date of the notice of action you are dissatisfied with.